No. 181.

Brief of Reuben Hatch for Appellee

Office Supreme Court U. S.
FILED
FEB 1 1900
Clerk

# BRIEF FOR APPELLEE.

Filed Feb. 1, 1900.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 181.

THE COUNTY OF APACHE, APPELLANT,

*vs.*

JULIA BARTH, EXECUTRIX OF JACOB BARTH, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

REUBEN HATCH,
*Attorney for Appellee.*

(17,244.)

# SUPREME COURT OF THE UNITED STATES.

| | |
|---|---|
| THE COUNTY OF APACHE, Appellant, vs. JULIA BARTH, Executrix of JACOB BARTH, Deceased. | October Term, 1899. No. 181 (17244). |

## BRIEF FOR DEFENDANT.

It is claimed, in support of the judgment, on behalf of the appellee:

First. That the errors complained of cannot be reviewed by this Court for the reason that the record contains no "statement of the facts of the case in the nature of a special verdict," as provided by the Act of Congress of April 7, 1874, ch. 80, 18 Stat. 27, and no bill of exceptions duly settled and signed by the judge who tried the case.

Second. That, even if the Court should feel authorized to examine into the proceedings of the trial in the District Court, as disclosed by this record, it would be found that only one ruling on the admission or rejection of evidence adverse to the appellant was made and that was in the admission of the warrants, but that ruling is not subject to review for the reasons (a) that no exception was taken thereto; (b) that there was no assignment of error in the Supreme Court of Arizona on any rulings on the admissi-

bility of evidence, therefore no such rulings were passed upon by that court. Moreover the grounds of objection to the admission of the warrants in evidence stated in the record are untenable.

Third. That the findings of fact are general and support the judgment and, there being no question of the admissibility of evidence before the court, that therefore, aside from the question of whether or not the question of the statute of limitations having run against the warrants is raised by the demurrer, the record presents no question for the determination of this court.

Fourth. That the question as to whether or not the statute of limitations had run is not presented on demurrer for the reasons (a) that the appellant waived the demurrer by going to trial on the merits on the issue joined upon the complaint and answer instead of submitting the question on demurrer; (b) that the District Court did not dispose of the demurrer and therefore there is no judgment of the lower courts on the demurrer before this court for review; (c) if the District Court had rendered judgment overruling the demurrer, no appeal would lie to this court therefrom because such judgment would not be final.

Fifth. That, even if the question as to whether or not the warrants were barred by the statute of limitations was before the court on the demurrer, it could not be determined for the reason that the statute did not begin to run until there was money "set apart," in the treasury "properly applicable" to their payment in the order of their presentation, or until sufficient time had elapsed in which to provide the money in the mode pointed out by statute, or until the county repudiated the warrants; and the time when either one of these conditions began to exist does not appear on the face of the complaint, except that it does appear that the warrants were repudi-

ated in 1888, less than five years before the suit was begun.

First. The errors complained of cannot be reviewed by this court for the reason that the record contains no "statement of the facts of the case in the nature of a special verdict," as provided by the Act of Congress of April 7, 1874, ch. 80, 18 Stat. 27, and no bill of exceptions duly settled and signed by the judge who tried the case.

The practice on appeals from territorial courts is governed, not by the laws of the territory, but by said Act of Congress and, under that act, the evidence at large is not sent up to this court, but "a statement of the facts of the case in the nature of a special verdict" and rulings on the admission or rejection of evidence can only be brought up for review by a bill of exceptions properly settled and signed by the judge who tried the case.

*Gray vs. Howe*, 108 U. S., 12.
*Bonnifield vs. Price*, 154 U. S., 672.
*Grayson vs. Lynch*, 163 U. S., 468.

If it should be contended that the statute of Arizona governs, we reply that the statute which was in force at the time of the trial in the District Court, required the exceptions to be taken at the time the rulings were made and that they should afterwards be embodied in a bill signed by the judge. That statute was as follows:

"823. (Sec. 175.) Whenever in the progress of a cause either party is dissatisfied with any ruling, opinion or other action of the court, he may except thereto at the time the same is made or announced and at his request time shall be given to embody such exception in a written bill."

*Revised Statutes of Arizona of 1887*, page 184.

"It shall be the duty of the party taking any bill of exceptions, to reduce the same to writing and present the

same to the judge for allowance during the term, or within ten days after the term, if tried less than ten days before the end of the term, and the time may be further extended twenty additional days, *provided* the order making such extension be made before the expiration of the term of court.

If the same shall be handed to opposite attorney, or lodged with the clerk, it shall be deemed to have been presented to the judge at that date, and the bill of exceptions as finally settled shall be signed by the judge as of that date.

If the bill of exceptions contains all the evidence, no statement of fact shall be necessary."

*Session Laws of Arizona*, 1893, Act No. 9, page 8.

"829. (Sec. 181.) It shall be the duty of the judge to submit such bill of exceptions to the opposite party or his counsel, if in attendance on the court, and if the same is found to be correct, it shall be signed by the judge without delay and filed with the clerk during the term."

*Revised Statutes of Arizona, 1887*, page 184.

The trial took place May 6, 1896, although the findings of the District Court were not filed until March 20th, 1897.

*Record*, pages 154, 167.

March 18, 1897, an act was passed by the Legislative Assembly of Arizona containing the following provisions:

"Sec. 1. Whenever an appeal or writ of error is taken from any District or Circuit Court of this Territory to the Supreme Court of the Territory the appellant or plaintiff in error, as the case may be, may have the testimony taken in the case transcribed and certified by the court reporter and file the same with the papers in the case, and

thereupon it shall become and be a part of the record in such cause."

"Sec. 5. All rulings made by the court below in opposition to the plaintiff in error or appellant shall be taken as excepted to by the party appealing or suing out the writ of error, and when assigned as error in the brief shall be reviewed by the Supreme Court without any bill of exceptions or other assignment of errors as herein provided."

*Session Laws of 1897*, page 127.

But this act cannot apply to the proceedings on the trial of this case. Under the law as it stood at the time of the trial, exception was required to be taken at the time the ruling was made and embodied in a bill of exceptions during the term or within ten days after the conclusion of the term. If no exception was taken at the time the ruling was made, the opposing counsel and the court would have the right to conclude that the objection was waived and, in the conduct of the case thereafter, would govern themselves accordingly. If the objection was insisted upon, proof might be offered to remove the objection, which would not be offered if it were waived. It would manifestly be unjust to the court and counsel as well as the adverse party to apply such a radical change in the conduct of trials as the new law introduced, to a case tried long before the act was passed, as that would render it impossible to correct errors, which might have been corrected, at the time, if counsel had understood that they were not waived by failure to except.

This construction of the law could work no hardship to the appellant, as its counsel must have known, at the time of the trial, what the law *then* in force was; that it applied to that trial and that it required exceptions to be taken to all adverse rulings.

Besides the statutes of Arizona, in force at the time the act of 1897 above quoted was passed, provided

"2930. (Sec. 3.) No statute or law is retroactive unless expressly so declared therein."

*Revised Statutes of Arizona, 1887*, page 522.

The act of 1897 is not declared therein to be retroactive.

The affirmance of the judgment of the District Court by the Supreme Court of Arizona, was, in effect, an adoption of the facts found by the District Court.

*Neslin vs. Wells*, 104 U. S., 428.
*Bear Lake Irrigation Co. vs. Garland*, 164 U. S., 1, 18.

In addition to this, the Supreme Court expressly adopted the facts as found by the District Court, as the statement of facts in the case.

The statement of the Supreme Court is "The Supreme Court takes the facts as found by the District Court on the trial in that court and as shown by the record and makes them the statement of the facts in this cause."

This is the only statement of facts made by the Supreme Court. All that follows in the statement of the court relates to the law of the case and the conclusions of the court thereon.

*Record*, page 235.

The findings of the District Court were general and set forth that the case came on for trial on the 6th day of May, 1896, and that evidence was introduced, both oral and documentary, that the court was fully advised of the facts and law in the premises, and "That all the warrants sued on in the said amended complaint, except those heretofore herein described, are valid, subsisting and legal claims against the said defendant, Apache County, and

that the plaintiff, according to the prayer of her said complaint, is entitled to recover of and from the said defendant, the face value of each of said warrants, together with interest thereon at the rate of 10 per cent per annum until paid, from the date on which each of said warrants was presented to the treasurer of said Apache County for payment and payment thereof was refused because of lack of funds;" and further "that each of said warrants was presented to the treasurer of said Apache County and the payment thereof for lack of funds was by said treasurer refused at the dates hereinafter respectively mentioned."

*Record,* pages 154, 155.

These findings of the District Court do not amount to a "statement of facts in the nature of a special verdict," but, like the general verdict of a jury, they support the judgment and, as there is no ruling of the District Court on the admission or rejection of evidence here for review, there is nothing presented by the record for the determination of this court.

*Marshall vs. Burtis,* 19 Sup. Ct., 290.
*Cohn vs. Daley,* Id., 802.
*Salina Stock Co. vs. Salina Creek Co.,* 163 U. S., 109.
*Grayson vs. Lynch,* Id., 468.
*St. Louis vs. Western Union Tel. Co.,* 166 U. S., 388.

It is needless to multiply cases to show that, since the passage of the act of April 7, 1874, ch. 80, 18 Stat. 27, this court has invariably held that, in appeals from territorial courts, the only questions before the court are whether or not the findings support the judgment and whether or not there was error in the rulings of the lower court on the

admission or rejection of evidence. The weight of evidence or its sufficiency to justify the findings cannot be considered.

*Hecht vs. Boughton*, 105 U. S., 235.
*Idaho & Oregon Land Co. vs. Bradbury*, 132 U. S., 509.
*Mammoth Min. Co. vs. Salt Lake Machine Co.*, 151 U. S., 447.
*Haws vs. Victoria Copper Min. Co.*, 160 U. S., 303.
*Harrison vs. Perea*, 168 U. S., 311, 323.
*Halloway vs. Dunham*, 170 U. S., 615.

Second. Even if the court should feel authorized to examine into the proceedings of the trial in the District Court, as disclosed by this record, it would be found that only one ruling on the admission or rejection of evidence adverse to appellant was made and that was in the admission of the warrants, but that ruling is not subject to review for the reasons (a) that no exception was taken thereto; (b) that there was no assignment of error in the Supreme Court of Arizona on any rulings on the admissibility of evidence, therefore no such rulings were passed upon by that court. Moreover the grounds of objection to the admission of the warrants in evidence stated in the record are untenable.

Without waiving our objection that there is no record here, from which this court can be informed of the proceedings which took place upon the trial, it may be said that a reference to the reporter's statement shows that the warrants were offered in evidence by counsel for plaintiff in the court below, at the beginning of the trial, before the attempted verification of the answer, and their introduction in evidence was objected to by appellant's counsel on the grounds stated by him as follows:

"We must certainly object to the introduction of these warrants. This offer is evidence of their demand. It bears no public seal, no solemn evidence of the indebtedness; that bears the name of forgery upon its face, and I say we object to it and object to being bound by these papers; they are immaterial, incompetent and improper."

*Record*, page 169.

This is equivalent to saying that the warrants were incompetent or improper because they bore no seal and the word forgery was written on them. They certainly were not immaterial. By alleging the want of a seal and the fact that the word forgery appeared on the warrants as two grounds of incompetency all other grounds which might have been urged were waived.

*Evanston vs. Gunn*, 99 U. S., 660.

The record fails to show any exception to the ruling of the court admitting the warrants so that appellant is not in position to urge its objection here.

*Record*, pages 169, 170.
*Hutchins vs. King*, 1 Wall., 53.
*Lober vs. Cooper*, 7 Id., 565.

The act of April 7, 1874, requires exception to be taken to all rulings on the admission or rejection of evidence in order to entitle the party against whom the rulings are made to allege error thereon.

Even if exception had been seasonably taken there was no assignment of error in the Supreme Court of Arizona which authorized that Court to pass upon the question as one of the admission or rejection of evidence. The assignments of error are summarized in the opinion of Mr. Justice Doan, as follows:

"1. The court erred in not sustaining defendant's general plea of limitation.

2. The court erred in not sustaining defendant's special plea of limitation to each of the forty counts set up in plaintiff's amended complaint and in finding against those pleas.

3. The court erred in finding that the warrants sued—and each of them, save those admitted to be forged, was and were legally issued.

4. The court erred in finding against defendant's plea that the said warrants and each of them were forged and of no binding effect on defendant.

5. The court erred in rendering judgment for plaintiff and against the defendant for the reasons that the said judgment was contrary to the evidence in the case, and that it was contrary to the evidence as shown by the record and against the law of the case."

*Record*, page 224.

This court is confined to a review of the questions presented to the lower courts.

*Clark vs. Fredericks*, 105 U. S., 4.
*Walker vs. Sauvinet*, 92 U. S., 90.

But, in any case, the objections were properly overruled. The statute of Arizona, under which the warrants were issued, did not require a seal.

The warrants themselves were *prima facie* evidence of liability and were admissible in evidence without further proof than the production of the warrants properly executed.

*Leach vs. Wilson County*, 62 Tex., 331.
*Rollins vs. Board of Com'rs.*, 33 C. C. A., 181.
*Board of Com'rs. vs. De Lana*, 57 Pac., 162.
*Johnson vs. Board of Com'rs.*, 56 Pac., 701.

Even if the warrants were not admissible in evidence without some explanation of the way in which the word "forgery" came to be written on them, that explanation was subsequently furnished by appellant's own testimony and, as the case was being tried before the court without a jury, if the explanation, no matter when it was made in the course of the trial, removed the objection, the court could then properly receive the warrants in evidence.

The testimony referred to is that of the witness N. Gonzales.

*Record*, pages 171, 174.

From that it appears that on January 9th, 1888 (pages 133, 223 of the record show the correct date, that given on page 174 being a mistake), the warrants were presented by J. Barth, the then holder and appellee's testator, to the board of supervisors and that they were then marked "forgery" by the board and the treasurer was directed to return them so marked to Mr. Barth. That was four years after they were issued and after they had been presented to the treasurer for payment and payment refused for want of funds and they had been stamped "Not paid for want of funds" and returned to the holder, and after they had been transferred once or twice. Marking them forgery amounted to no more than the bare assertion by the maker that they were forgeries without producing any proof that they were or specifying in what it was claimed the forgery consisted. That would not have the effect to alter the rules of evidence or impose upon the holder the burden of proving that they were not forgeries.

After appellee had rested her case an attempt was made by appellant, by leave of the District Court, to verify the answer. It was then claimed by appellant's counsel that the burden was thereby shifted upon appellee to show by some other proof than the warrants themselves that they

were valid, or, in other words, that they were not forged.

To this we reply that, even if the effect of a proper verification of the answer would be to shift the burden of proof, the affidavit of N. Gonzales attached to the answer, which is claimed to be a verification, is insufficient in that it does not appear that he had any knowledge of the facts or, if he had, that he was authorized to make the affidavit.

*Record*, pages 151, 152.

But the effect of the verification, if sufficient, would not be to shift the burden of proof, but simply to entitle the defendant to offer evidence in support of the defense set up in the answer. This was not done. No evidence whatever was offered having any tendency to show that the warrants were forged.

The Revised Statutes of Arizona of 1887 provide:

"735. (Sec. 87.) Any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit—

1. That the suit is not commenced in the proper county.

2. That the plaintiff has not the legal capacity to sue.

3. That the plaintiff is not entitled to recover in the capacity in which he sues.

4. That there is another suit pending in this territory between the same parties for the same cause of action.

5. That there is a defect of parties plaintiff or defendant.

6. A denial of partnership as alleged in the complaint, whether the same be on the part of the plaintiff or defendant.

7. That the plaintiff or defendant alleged in the complaint to be duly incorporated, is duly incorporated as alleged.

8. A denial of the execution by himself or by his authority of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit will be sufficient if it state that the affiant has reason to believe and does believe, that such instrument was not executed by the decedent or by his authority.

9. A plea denying the genuineness of the indorsement or assignment of any written instrument.

10. That a written instrument upon which a pleading is founded, is without consideration, or that the consideration of the same has failed in whole or in part.

11. That an account which is the foundation of the plaintiff's action and supported by an affidavit, is not just, and in such case the answer shall set forth the items and particulars which are unjust."

*Revised Statutes of Arizona of 1887*, page 174.

Subdivision 8 above quoted furnishes an exception from which it may reasonably be implied that in all cases, save where an instrument is charged to have been executed by a deceased person, it was the intention of the legislature to provide that the answer must be verified by some person having personal knowledge of the facts. The answer in this case is not within the exception yet it was not verified by a person who appears to have had knowledge of the facts.

Subdivision 8 above quoted requires "a denial of the execution" of the instrument on which suit is brought. The affidavit annexed to the answer contains no such denial. The statement in the affidavit that the warrants

are not genuine is a very different thing from stating that they were not executed.

The affiant really swears to nothing. He states that the "facts therein stated as defenses" are true. Facts are always and under all circumstances true. He does not state what matters contained in the answer are facts.

The statute nowhere provides that the effect of the verification shall be to shift the burden of proof. Without such provision the burden would not be shifted. The answer would not be good unless it was verified and the defendant would not be entitled to offer any evidence to support it. That can be the only effect of a lack of verification under the statute.

Counsel for appellant waived his position that the attempted verification of the answer, after appellee had rested her case, cast upon plaintiff the burden of explaining why the word forgery appeared upon the warrants and of showing that they were not forgeries, by stating to the court that it was immaterial to him in what order the proof was made. The reporter's statement shows the following proceedings after the attempted verification:

"By the Court: Are you ready to proceed with the case?

By General Wilson: We are ready, your honor. (The amendment is made, in that the answer is verified.) And I think that on the verified answer the onus is on them to proceed. However, I am not particular about the order in which it goes in. I think, though, that the onus is on them, but that will be a matter for argument later on. I would like to have Gonzales sworn."

*Record*, page 170.

Third. The findings of fact are general and support the judgment and, there being no question of the admissibility of evidence before the court, therefore, aside from

the question of whether or not the question of the statute of limitations having run against the warrants is raised by the demurrer, the record presents no question for the determination of this court.

*Marshall vs. Burtis*, 19 Sup. Ct., 290.
*Cohn vs. Daley*, Id. 802.
*Salina Stock Co. vs. Salina Creek Co.*, 163 U. S., 109.
*Grayson vs. Lynch*, Id., 468.
*St. Louis vs. Western Union Tel Co.*, 166 U. S., 388.

Fourth. The question as to whether or not the statute of limitations had run is not presented on demurrer for the reasons (a) that the appellant waived the demurrer by going to trial on the merits on the issue joined upon the complaint and answer instead of submitting the question on demurrer; (b) that the District Court did not dispose of the demurrer and therefore there is no judgment of the lower courts on the demurrer before this court for review; (c) if the District Court had rendered judgment overruling the demurrer, no appeal would lie to this court therefrom because such judgment would not be final.

The allegations of the complaint are, in substance, that the several warrants in controversy were duly issued and were at various times during the year 1884, presented by the lawful holder thereof to the treasurer of the county for payment, and payment was refused for want of funds; that the treasurer endorsed upon the warrants the words "Not paid for want of funds," with the date of the presentation, which endorsement was signed by him as treasurer. Then follow these averments, which are applicable to all the warrants,—"4."

"That in and by said presentation to and endorsement, as aforesaid, by said treasurer the warrant became, was,

and is entitled to preference as to payment out of moneys in said treasury appropriated to and belonging to said fund according to the priority of time in which the same was presented, as aforesaid, over other warrants on said fund; that said treasurer has not at any time since said warrant was so, as aforesaid, presented and endorsed by said treasurer, set apart any money nor so much as may be necessary for the payment of said warrant or any part thereof; that there has not been at any time since then nor is there now any moneys set apart in said treasury applicable to the payment of said warrant or any part thereof."

"That afterwards and on or about the fifth day of April, 1887, the defendant's board of supervisors, under and by virtue of chapter 2, title 31, of the Revised Statutes of Arizona, 1887, duly decided to fund and redeem all its outstanding indebtedness; and thereupon said board gave due notice that the said board would fund and pay in bonds all outstanding indebtedness of said county, including said warrant; and thereupon and within the time limited in said notice, to-wit, on January 9th, 1888, said Jacob Barth caused said warrant, among others, to be presented to said board for approval, redemption, and funding under said notice and law; but the said warrant or any part thereof the said board and said defendant failed and refused and still fails and refuses to approve, redeem, or fund."

*Record*, page 75.

The substance of these allegations is that the warrants were not paid on presentation in 1884, for want of funds; that in 1888 they were again presented, under a call made by the proper authorities of the county for the funding or redemption of all outstanding warrants, without reservation, and the validity of the warrants was then, for the

first time, disputed; that in the meantime there had been no money set apart in the fund on which they were drawn for the payment thereof.

If the statute of limitations began to run when the warrants were first repudiated, it appears from these allegations that they were not barred at the time suit was begun, which was in September, 1891 (Record, pages 52, 53), and the demurrer should be overruled. It should be overruled unless it affirmatively appears on the face of the complaint that the statute had run.

If the statute began to run when there was money provided in the fund or "set apart" to pay the warrants in the order of their presentation, or when sufficient time had elapsed for the county to provide the money in the mode pointed out in the statute, that raises a question of fact which cannot be determined on demurrer.

To this complaint the defendant demurred and answered at the same time. The grounds of the demurrer are, first, that the complaint failed to state facts sufficient to constitute a cause of action and second, that the warrants show upon their face that "more than five years elapsed from the date of the pretended issuance of the same and each of the same and from the time that they and each of them were presented to the treasurer of said county for payment until the bringing of this action."

*Record,* page 132.

Defendant also set up the defense of the statute of limitations in its answer as follows:

"4. Avers that more than five years have elapsed since the pretended issuance of the same" (warrants giving the numbers) "and the presentation thereof to the treasurer of said county for payment until the bringing of this action, and therefore the same is barred by the statute of limitations."

*Record,* page 137.

Upon the issue of fact thus joined between the parties by the complaint and answer, the case was tried and submitted to the District Court and judgment was rendered upon the evidence. No disposition appears to have been made of the demurrer. These proceedings are set forth in the findings and judgment of the District Court.

*Record*, page 154.

By going to trial upon the merits, the defendant elected to try the question of the statute of limitations in that manner and as raised by its answer to the complaint and not upon its demurrer.

*Bell vs. Railroad Co.*, 4 Wall., 598.
*Evans vs. Gee*, 11 Pet., 79, 85.

The District and Supreme Courts of Arizona did not dispose of the demurrer. There is, therefore, no decision or judgment of those courts upon the demurrer which this Court can review. The only judgment rendered by the District Court was upon the merits after hearing the evidence offered on the issue joined by the complaint and answer and that is the only judgment which is before this court for review. That judgment is supported by the findings which are conclusive in this court.

A judgment overruling the demurrer would not have been final if the party demurring had the right to plead over and try the same questions which were involved in the demurrer under a plea or answer denying the allegations of the complaint.

*Meagher vs. Minnesota Thresher Mfg. Co.*, 145 U. S., 608.
*McLish vs. Roff*, 141 U. S., 661.
*Bostwick vs. Brinkerhoff*, 106 U. S., 3.
*Zeller vs. Switzer*, 91 U. S., 487.
*Miner's Bank vs. United States*, 5 How., 213.

If the demurrer had been overruled the defendant in the District Court would have had its election to stand by its demurrer or go to trial on the merits on the issue joined on the complaint and answer. The answer was already in so that it would not have been necessary to have obtained leave to plead over. Defendant proceeded with the trial of the case on the merits the same as though it had exercised its election not to stand by the demurrer, but to plead over and try the case on the facts. Upon that issue it litigated the question of whether or not the warrants were barred by the statute of limitations. The findings and judgment of the court on all questions involved in that issue are final in this court. There is, therefore, no question here on the demurrer.

The issue thus joined involved questions of fact upon which the findings of the District and Supreme Courts of Arizona are conclusive.

Fifth. Even if the question as to whether the warrants were barred by the statute of limitations were before the court on the demurrer, it could not be determined for the reason that the statute did not begin to run until there was money set apart, in the treasury with which to pay them, in the order of their presentation, or until sufficient time had elapsed in which to procure the money in the mode pointed out by statute, or until the county repudiated the warrants; and the time when either one of these conditions began to exist does not appear on the face of the complaint, except that it does appear that the warrants were repudiated in 1888, less than five years before the suit was begun.

The statute of limitations of Arizona is as follows:

"2314. (Sec. 18.) Actions for debt when the indebtedness is evidenced by or founded upon any contract in writing executed within this territory shall be commenced

and prosecuted within five years after the cause of action shall have accrued, and not afterwards."

*Revised Statutes of Arizona of 1887*, page 407.

The Compiled Laws of Arizona of 1877, which apply to the warrants in question, provided:

"154 (Sec. 9). The county treasurer, when an order drawn on him, as such treasurer, by the commissioners of his county, is presented for payment, shall, if there be money in the treasury for that purpose, redeem the same, and shall write on the face of such order, "redeemed," the date of redemption and shall sign his name thereto."

"(155) Sec. 10. When any order or warrant shall be presented to the county treasurer for payment, and the same is not paid for want of funds, the treasurer shall indorse thereon 'not paid for want of funds' annexing the date of presentation and sign his name thereto, and from that time till redeemed, said order or warrant shall bear ten per cent interest per annum."

"(156) Sec. 11. So soon as there shall be sufficient funds in the treasury of the county to redeem the orders or warrants drawing interest, the county treasurer shall give notice in some newspaper in his county, or if no newspaper be printed in his county, then by written or printed notices posted upon the court-house door, stating therein that he is ready to redeem said orders or warrants, and from the date of such notice said orders or warrants shall cease to bear interest."

"(157) Sec. 12. When the county treasurer shall redeem any order on which any interest is due, he shall note on the order or warrant the amount of interest paid thereon, and shall enter on his account the amount of such interest, distinct from the principal."

"(158) Sec. 13. Orders or warrants drawn on the county treasury and properly attested, shall be entitled to preference as to payment out of moneys in the treasury

properly applicable to such order, according to the priority of time in which the same may have been presented. The time of presenting such order shall be noted by the treasurer, and upon the receipt of any moneys into the treasury not otherwise appropriated, it shall be the duty of the treasurer to set apart the same, or so much thereof as may be necessary for the payment of such order or warrant."

*Compiled Laws of Arizona of 1877*, page 56.

These provisions of the statute were first enacted in 1864 and are contained in Chapter 6 of the Howell Code. That entire chapter appears to have been borrowed from California as its provisions including the portions above quoted are identical with the California statute passed March 27th, 1850.

*General Laws of California, 1850, 1864*, Sections 7184 to 7202 inclusive.

If, under the foregoing provisions of the statute, the payment of warrants indorsed by the treasurer "not paid for want of funds," could not be coerced after such indorsement until there was money in the treasury with which to pay them, or until sufficient time had elapsed for providing the money in the mode pointed out by the statute, then the statute of limitations would not begin to run until after the money with which to pay them was in the treasury or until sufficient time had elapsed in which to provide the money; and that would involve a question of fact which could not be determined upon the demurrer to the complaint.

When the holder of these warrants presented them to the treasurer in 1884, and payment was refused for want of funds, and the treasurer took them and indorsed thereon "not paid for want of funds," and then returned

them to the holder, who accepted them with such indorsement written thereon, a new contract was effected between the holder and the county, whereby the holder consented to extend the time of payment until there should be sufficient money in the treasury with which to pay them. He held the warrants from that time forth subject to the provisions of the statute, the statute becoming, by implication, a part of the contract, as much so as though it had been embodied in the warrants themselves.

*Lincoln County vs. Luning*, 133 U. S., 529, 533.
*Fernandez vs. City*, 46 La. Ann., 1130.
*State vs. Lincoln County Commrs.*, 23 Nev., 262.

The latter case arose under a statute of Nevada making provision for a fund to be applied to the payment of interest on county bonds. The statute provided that if the fund should be exhausted before the interest was paid, the interest coupons could be presented to the treasurer, who should indorse thereon a certificate of such presentation and thereafter the coupons should be payable, as money came in, in the order of their presentation.

The court say, as to coupons which had been so indorsed: "The creditor accepted this proposition when he presented the coupons and had their presentation certified by the treasurer. This was in the nature of an agreement for an extension of time for their payment. The creditor agreed to wait, no matter how long it might take, for payment under that arrangement, and he has waited accordingly. As long as the tax was being levied and collected there was no occasion for him to bring an action, and, if he had, it seems very probable it could not have been maintained, had the proper defense been made. But when the money was collected he would be entitled to it; then his cause of action would be fully ripe, and if

not presented within the statutory period, would doubtless be barred."

*State vs. Lincoln County Commrs.*, 23 Nev., 262, 266.

The warrants were converted into interest bearing obligations and became payable thereafter in accordance with the provisions of Sec. 13, above quoted. Before they were indorsed they were not payable in any particular order. By such indorsement they became "entitled to preference as to payment out of moneys in the treasury properly applicable" thereto "according to the priority of time in which the same may have been presented." The holder could not coerce payment of a warrant out of its order, but must wait for payment until after those warrants, which had been presented before his, were paid.

The indorsement postponed the time of payment until all warrants "entitled to preference as to payment" were paid. The statute of limitations would certainly not begin to run against a warrant until the time for its payment had arrived. It would not begin to run against the warrants in question until there was money in the treasury set apart for their payment in the order prescribed.

*King Bridge Co. vs. Otoe County*, 124 U. S., 459.
*Brewer vs. Otoe County*, 1 Neb., 373.
*Wilson vs. Knox County*, 132 Mo., 387.
*Grayson vs. Latham*, 84 Ala., 546.
*The Justices vs. Orr*, 12 Ga., 137.
*Fernandez vs. City*, 46 La. Ann., 1130.
*Frechill vs. Chamberlain*, 65 Cal., 603.

The statute under which the warrants in *Brewer vs. Otoe County* were issued may be found in

*King Bridge Co. vs. Otoe County*, 124 U. S., 461, 462.

It is true that this Court, in *King Bridge Co. vs. Otoe County,* 124 U. S., 459), felt bound to follow *Brewer vs. Otoe County* (1 Neb., 373) in the construction there placed upon the Nebraska statute. But this Court announced, with apparent approval, the principle upon which that case was decided, namely, that "the cause of action did not accrue when the payment was refused, 'but only when the money for its payment is collected, or time sufficient for the collection of the money has elapsed.' "

This principle had already met with the sanction of this Court in *Lincoln County vs. Luning* (133 U. S., 529), where it is said by Mr. Justice Brewer:

"The coupons which by the general limitation law would have been barred, were presented, as they fell due, to the treasurer for payment and payment demanded and refused, because the interest fund was exhausted. Thereupon the treasurer registered them as presentd, in accordance with the act of 1877, and from the time of their registration to the commencement of this suit there was no money in the treasury applicable to their payment. This act, providing for registration and for payment in a particular order, was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

It is claimed by counsel for appellant that Arapahoe Village vs. Albee (24 Neb., 242) practically overrules Brewer vs. Otoe County. But such was manifestly not the intention of the Court. The former case is clearly distinguished from the latter for the reason, as stated in the opinion, that the Nebraska statute, applicable to county warrants and which the Court, in the former case, say the Court, in the latter case, held, took such warrants out of the statute of limitations, did not apply to village warrants. The statute applicable to county warrants, as quoted in the opinions in both cases, was similar in all essential particulars to the Arizona statute. It provided that orders not paid, on presentation, for want of funds, should be so indorsed by the treasurer, that thereafter they should draw interest at the rate of ten per cent per annum and be paid in the order of presentation.

There was no such statute in reference to village warrants, which were involved in *Arapahoe County vs. Albee.* It is the operation of the statute upon county warrants indorsed by the treasurer "not paid for want of funds," which makes them payable at such time as there shall be money in the fund on which they are drawn applicable to their payment, in the order of presentation, and not before, and prevents the starting of the statute of limitations until the warrants become payable in accordance with the terms of the statute.

The Court, in *Arapahoe Village vs. Albee,* does not overrule the doctrine laid down in *Brewer vs. Otoe County* that "Whoever deals with a county and takes in payment of his demand a warrant in the character of these, no time of payment being fixed, does so under the implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condi-

tion of the laws regulating and controlling the business of the country. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed."

The correctness of this principle is affirmed in *Wilson vs. Knox County* (132 Mo., 387). In Missouri there is a special statute of limitations applicable to warrants which provides that the limitation of five years for bringing suit shall not begin to run on warrants endorsed "not paid for want of funds" until there are funds on hand with which to pay them. The Court says: "The principle established thereby that the holder of a county warrant is not to be barred of his action thereon if he diligently seeks payment thereof according to the requirements of the statute, until after there shall have been money in the treasury set apart for its payment, is not only consonant with justice and fair dealing, but conducive to the proper and orderly management of the financial affairs of the county, in which all its creditors ought to be paid as near as may be in the order of their priority, and in which all ought to be paid, except such as have lost their right by their own laches."

*Wilson vs. Knox County*, 132 Mo., 387.

Counsel for appellant has cited this case as it is reported in the 28 S. W. Rep., as sustaining the principle for which he contends, namely, that the statute began to run at the date of the warrants. But that decision is not authority, for the reason that it was rendered by one division of the Court and does not appear in the official state reports of Missouri. The case afterwards came before the Court in banc and is reported in the 132 Mo., 387. The decision of the Court in banc turns upon the point that the case is governed by the special statute referred to. The Court re-

frains from expressing any opinion as to whether or not the action would have been barred if there had been no special statute.

In *Cross vs. Board of Commissioners of Grant County* (54 Pac., 880), cited by counsel for appellant, the Supreme Court of New Mexico distinguished that case from *King Bridge Co. vs. Otoe County* on the ground that in the latter case there were a demand and refusal to pay within the statutory period, while in the former case the demand and refusal were considerably outside of that period. The authority of *King Bridge Co. vs. Otoe County* is not questioned.

There is no statement of facts in the report of the case of *Perry vs. Parish of Vermillion* (21 La. Ann., 645), also cited by counsel for appellant, except that it is stated that the suit was on warrants, which were over five years *past due*. That appears to be the limitation period. The only point decided was that the statute could be pleaded by the parish.

*King vs. City of Frankfort* (43 Pac., 983), is a decision of the Kansas Court of Appeals. It was an action on a warrant of the city *payable at a fixed date*. The Court held that the statute began to run on that date.

In *Carpenter vs. The District Township of Union*, 58 Ia., 335 (12 N. W., 280), the warrants were issued under a statute very different from the Arizona statute. But in that case it is intimated that if the warrants were, by the provisions of the statute, to be held until funds were in hand for their payment, they would not be barred until the statutory period had run, from the time the funds came in, and, on that ground an attempt is made to distinguish the case from *The Justices vs. Orr*, 12 Ga., 137.

In *Crudup vs. Ramsey*, 54 Ark., 168 (15 S. W., 458), cited by counsel for appellant, which was mandamus to compel the county treasurer to pay certain warrants

drawn on him, the Court held that the statute, which made warrants receivable for taxes irrespective of their number and date, was not intended to take them out of the operation of the general statute of limitations.

The case of *Crawford County vs. Wilson* (7 Ark., 214), also cited by counsel for appellant, decides that county warrants are transferrable by delivery, that the transferree is authorized to maintain suit in his own name, and that the original holder, who has parted with them for less than their face value, has no action against the county for the difference between their face value and the amount he received for them. The case decides nothing more. It does not decide when suit on such warrants may or must be brought.

While the case of *Goldman vs. Conway County* (10 Fed., 888), appears, at first glance, to be authority for the position taken by appellant, a careful consideration of the case discloses many reasons for disputing its authority in this case.

The Arkansas statute contains no provision making warrants indorsed "not paid for want of funds" payable thereafter in the order of their presentation, the necessary effect of which would be to postpone the time of their payment to some future day. Nor does the statute of that state provide for the payment of such warrants out of a fund to be "set apart" for that purpose, by the county treasurer, from money not otherwise appropriated.

The Court, in deciding *Goldman vs. Conway County*, does not question the authority of *Brewer vs. Otoe County* (1 Neb., 373), which was decided ten years before. It does attempt to state what was decided in the case of *Justices vs. Orr* (12 Ga., 137), but utterly fails to do so. The opinion states that *Justices vs. Orr* decided this and no more, viz.: that where a county is not liable to be sued on such warrants and cannot be coerced to levy a tax for their

payment, the statute probably would not run against them. As showing what was decided in *Justices vs. Orr,* we quote from the opinion of Mr. Justice Lumpkin in that case.

"How does the statute of limitations apply to a case like this? when did it begin to run? Certainly not on the date of the certificates; for by the terms of the law under which they issued, the debt against the county was to be liquidated in this way, when, for want of funds, prompt payment could not be made; and they were to be held until funds were in hand for their discharge. Application was repeatedly made for this purpose, and the holders were put off, on the ground that there was no money in the treasury, and no authority to levy a tax for their redemption. And payment never was denied until last February; nor did the statute begin to run until that time."

*The Justices vs. Orr,* 12 Ga., 137, 141.

Even if it can be contended that the case of *Goldman vs. Conway County* is any authority whatever in favor of appellant's position, in this case, the weight of authority was against it at the time of its decision, and it has not been followed by any court.

*Thompson vs. Searcy County* (57 Fed., 1030), was a suit on Arkansas County, warrants and followed the rule in that state in holding that suit might be maintained on county warrants as soon as they were delivered to the payee without regard to the state of the treasury. The references, on that question, are all to Arkansas decisions.

No attempt is made to lay down a rule which would be applicable elsewhere under a different statute. In that case the warrants had not been indorsed "not paid for want of funds" and were not held under a statute which postponed their payment to a future time; to some time after all other warrants entitled to preference as to payment had been paid and which made them payable out of

a particular fund to be raised and "set apart" for that purpose.

In all the cases, it is conceded or implied that the statute would not begin to run until the holder of the warrants was at liberty to pursue his remedy in the courts. It would seriously interfere with the orderly conduct of the affairs of the county if the holder of warrants which had been indorsed "not paid for want of funds," under the Arizona statute, could immediately, on receiving them back from the treasurer so indorsed, turn around and sue the county. Undoubtedly, if he waited sufficient length of time to enable the county to provide the money, in the mode pointed out by statute, and the county unreasonably neglected to provide it, or repudiated the warrants altogether, he could then sue, but not before.

Under a statute similar to the one in Arizona, in South Dakota, it was held that, if the treasurer attempted to pay any warrants out of the order of payment fixed by the statute, he would be enjoined at the suit of the holder of other warrants entitled to prior payment.

*Freeman vs. City of Huron*, 73 N. W., 260.

If the treasurer could be enjoined from paying warrants, which had been presented for payment and returned to the holder by the treasurer indorsed "not paid for want of funds," out of their regular order, it follows that he could not be compelled to pay any warrant until there was sufficient money in the treasury belonging to the fund on which it was drawn with which to pay it, in the order of its presentation. The remedy of the holder would be suspended in the meantime. The statute of limitations could not run while the remedy was suspended.

The time when there was money in the hands of the treasurer, with which to pay the warrants in question, in the order of presentation, cannot be ascertained without

looking into the evidence, which this court cannot do on this appeal, because the general findings of the District and Supreme Courts of Arizona are conclusive of every question of fact involved in the issue joined between the parties and tried in the case.

It has been held, in Texas, that the statute of limitations does not begin to run against county warrants until they have been repudiated by the county.

*Leach vs. Wilson County*, 62 Texas, 331.

It is alleged in the complaint that the warrants in question were repudiated by the county January 9, 1888.

*Record, page* 75.

If this Court were authorized to examine the evidence, as returned in the reporter's transcript, they would find proof to sustain this allegation.

*Record, page* 174.

They would also find that all the warrants presented for payment prior to January 1, 1885, which would include the warrants in question, were called for payment May 10, 1888.

*Record, pages* 180, 181.

This suit was begun in September, 1891.

*Record, pages* 52, 53.

Counsel for appellant, on page 27 of his brief, refers to the reporter's transcript for evidence that the county repudiated the warrants in 1885. We, of course, deny that there is any evidence returned to this court, to which reference can be made for any purpose whatever. Without waiving this position, we submit that the pages of the transcript referred to by counsel do not show anything of

the sort. If those pages could be examined for evidence, it would be found that they show nothing more than that the board of supervisors took action, in 1885, with reference to retaining counsel to prosecute certain persons charged with having forged warrants, but there is nothing to identify those warrants with the ones in question, besides if the warrants were identified, charging certain persons with forging them would prove nothing against the warrants. Retaining an attorney to prosecute a man for forging a paper falls a long way short of proving that the paper was forged. A resolution of the board of supervisors setting forth that they had examined witnesses in regard to certain warrants supposed to be fraudulent and that there was reasonable cause to believe that the warrants examined were fraudulent and instructing the treasurer not to pay them, without identifying those warrants, proves nothing against the warrants in suit. Neither is the admission of Mr. Johnston, attorney for appellee in the District Court, referred to by counsel as appearing in the pages above mentioned, that certain witnesses, which appellant proposed to call, would testify to certain things, any admission that those things were true, especially as he coupled his admission with an objection to the competency of the evidence offered. But this reference to the evidence is entirely impertinent, as the findings of the lower courts would be conclusive against appellant on every question of fact, even if the evidence were properly brought up.

In *Shannon vs. City of Huron* (9 S. D., 356, 363), it was held that as soon as money was collected in the proper fund, with which to pay warrants in the order of registration, the law made it the duty of the treasurer to set apart the money for that purpose, and that he thereafter became a trustee for the holder of the warrant.

*Shannon vs. City of Huron*, 9 S. D., 356, 363.

And in *Lincoln County vs. Luning* (133 U. S., 529), this Court said of an act providing for the registration and payment of coupons in a particular order that it created, as it were, a special trust which withdrew the coupons from the operation of the statute.

To the same effect are:

*Underhill vs. Sonora*, 17 Cal., 172.
*Freehill vs. Chamberlain*, 65 Id., 603.

Part of the warrants are drawn on the Road Fund. This appears at the head of the warrants, just over the date.

*Record, pages* 119, 121, 124, 129.

As to those warrants, suit could not be maintained without alleging that there was money in the fund with which to pay them.

*Travelers' Ins. Co. vs. Denver*, 11 Colo., 434.
*Board vs. Mason*, 9 Ind., 97.

In our case it is alleged that in 1888, less than five years before suit was brought, the county repudiated the warrants. At that time, of course, appellee's right to sue accrued, even if there was no money in the fund. To hold otherwise would be to hold that her right of action might never accrue.

As to the warrants drawn on the Road Fund, her right of action would not accrue, and consequently the statute of limitations would not begin to run against them, until either, there was money in the fund, or the county denied its liability altogether.

As to the remainder of the warrants, the act of the treasurer in indorsing them "not paid for want of funds" and returning them to the holder, thereby bringing them within the operation of the special statute applicable to such warrants, made them payable out of money there-

after to be "set apart," from the receipts of the treasury not otherwise appropriated, for their payment, in the order of their presentation. That made them payable out of a particular fund, in a particular way. They were not payable until money sufficient to pay them and all other warrants which should "be entitled to preference as to payment" * * * "according to priority of time in which the same may have been presented" was "set apart" for that purpose. The cause of action upon them would not accrue until that time, or until sufficient time had elapsed to provide the money, or until all liability on the warrants was denied by the county.

The authorities are agreed on this proposition.

*Lincoln County vs. Luning*, 133 U. S., 529.
*Grayson vs. Latham*, 84 Ala., 546.
*Wetmore vs. Monona*, 73 Ia., 88.
*Sawyer vs. Colgan*, 102 Cal., 283, 292.
*Davis vs. Simpson* (Nev.), 58 Pac., 146.
*Forbes vs. Grand County*, 23 Colo., 344.
*State vs. Lincoln Co. Comm'rs*, 23 Nev., 262.

It has been held in California that the legislative acts of that state providing for the funding of county indebtedness, have the effect of an acknowledgement or recognition of the indebtedness and withdraw the case from the operation of the statute of limitations.

*Underhill vs. Sonora*, 17 Cal., 172.
*Freehill vs. Chamberlain*, 65 Cal., 603.

On that principle the warrants in question would be withdrawn from the operation of the statute of limitations by the funding act passed by the Legislature of Arizona, March 19, 1891, which provides:

"Section 1. That the Act of Congress entitled 'An Act Approving with Amendments the Funding Act of Arizona,' approved June 25th, 1890, be and the same is hereby now re-enacted as of the date of its approval subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said Act of Congress, the loan Commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the territory, the counties, municipalities and school districts within said territory by the issuance of bonds of said territory, as authorized by said act and all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States."

"Sec. 7. Any person holding bonds, warrants or other evidence of indebtedness of the territory, of any county, municipality or school district within the territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this act at no less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon."

*Acts of the Legislature of Arizona*, 1891, *16th Assembly, Act number* 79, *pages* 97, 100.

The answer of Mr. Justice Doan in the opinion of the Supreme Court of Arizona filed in this case, to the position taken before that Court by the counsel for appellant, that the warrants in question were barred by the six months' statute of limitations of Arizona quoted in the opinion (Record, page 230), namely, that the statute refers only to unliquidated claims, which have been presented to the Board of Supervisors for allowance and not to warrants,

which represent claims that have been already passed upon or audited by the board, is supported by authority.

*Lincoln County vs. Luning*, 133 U. S., 529.
*Lorback vs. Lincoln County*, 94 Fed., 963.
*Greeley vs. Cascade County*, 57 Pac., 274.
*Freehill vs. Chamberlain*, 65 Cal., 603.

Reuben Hatch

Attorney for Appellee.